



September 24, 2021

VIA ELECTRONIC UPLOAD
DEFENSE ACQUISITION REGULATIONS SYSTEM (DARS)

Defense Acquisition Regulations System
Attn: Ms. Carrie Moore
OUSD(A&S) DPC(DARS)
3060 Defense Pentagon
Room 3B941
Washington, DC 20301-3060

RE: Early Engagement Opportunity: E.O. 14042

Dear Ms. Moore:

The Employment Law Alliance submits these comments in response to the Department of Defense's ("DoD") Early Engagement Opportunity: Implementation of Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors.¹

Background

The Employment Law Alliance ("ELA") is the world's largest and most prestigious network of labor and employment lawyers from member firms in more than 100 countries, all Canadian provinces, and all 50 U.S. states. ELA members work together as a team to ensure that multi-national companies receive consistent, seamless legal advice wherever the need arises. The organization offers clients access to its proprietary Global Employer Handbook, that provides up to date information on important labor and employment regulations for each jurisdiction across the globe.

The enclosed questions come from members of the ELA who are respected employment law practitioners who have devoted many years to representing federal contractors in the contractors' dealings with the federal government.

¹ Early Engagement Opportunity: Implementation of Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 *Fed. Reg.* 51875 (Sept. 17, 2021); available at <https://www.federalregister.gov/documents/2021/09/17/2021-20189/early-engagement-opportunity-implementation-of-executive-order-on-ensuring-adequate-covid-safety>.

Response to DoD's Request for Comments

In response to DoD's early engagement opportunity to support DoD's implementation planning for Executive Order Ensuring Adequate COVID Safety Protocols for Federal Contractors, the ELA members have provided the following questions. DoD advised that comments can be received up to 30 days after the date of its notice (September 17, 2021), but comments will be most useful if received by DoD within 7 days after the date of this notice. ELA is submitting these initial comments on September 24, 2021, but expressly reserves the right to supplement this submission within the prescribed 30 days with additional comments and questions as circumstances require, such as after the Safer Federal Workforce Task Force Guidance is issued.

- **Questions related to contracting**

- Will contractors receive a bilateral contract modification requiring vaccination?
- Will there be equitable adjustments to offset additional costs of compliance with the EO?
- Will contracting officers be given discretion on whether to modify an existing contract (*i.e.*, one that is not up for renewal, extension, or rebidding) to include a vaccination requirement? If so, will there be any criteria the contracting officer is required to follow?
- Will DoD consider purchase orders placed under a master agreement to be modifications triggering the Executive Order?
- If the contractor is required to provide their own legal counsel in the event of a lawsuit associated with the vaccine mandate, will there be an equitable adjustment to the contract ceiling to cover the increased cost as a result of our increased rates to cover these potential costs?
- For federal contractors subject to the OSHA ETS, will DoD provide guidance on how to deal with differing obligations and whether additional costs incurred in meeting both obligations are chargeable to contracts?

- **Questions related to coverage**

- Will the government be using the same coverage requirements that are currently used in existing statutes (*e.g.*, Davis-Bacon Act, Service Contracts Act, Walsh Healy Act, etc.)?
- Will the exemptions from coverage be similar to those under existing statutes (*e.g.* exemptions for FDIC insured institutions, exemptions for contractors working in Guam and other Pacific Islands or federally-permitted distilleries or other entities)?
- Will the term "workplace location" be interpreted to cover everyone who may be working in a corporate campus/multiple building situation, where many of the employees do not work on government contracts?
- Will 100% teleworking contractor employees require a vaccine if they never go into any workplace location?

- Will employees of a contractor who do not charge their time to federal contracts (also known as indirect employees) require a vaccine?
- Does DoD intend to incorporate vaccination requirements into contracts that are not covered by Executive Order 14042? If so which types of contracts and how will DoD deal with contractors in states prohibiting vaccination requirements?
- What efforts is DoD making to apply EO 14042 to existing contracts?
- Will recipients of Medicare and Medicaid funds subject to the upcoming CMS rules on mandatory vaccinations be exempted from the federal contractor vaccine requirements?
- Will state and private universities who contract with DOD be subject to these requirements?
- **Questions related to implementation**
 - Will the November 22, 2021 implementation date for federal employees apply to federal contractors?
 - Will contractors be given lead time to encourage employees who have not yet been vaccinated time to get vaccinated? If so, how much?
 - Will employees who are awaiting an appointment to be vaccinated be permitted to work provided they test negative?
 - Will the DoD provide contractors with unionized workforces additional time for union consultation and/or negotiations related to any mandatory vaccination and/or testing requirements? If so, how much?
- **Questions related to vaccinations**
 - What will be the deadline for full vaccination?
 - Are there any limitations on partially vaccinated employees?
 - If an employee previously contracted COVID and has antibodies, will a vaccination still be required? If so, when will they be required to be fully vaccinated?
 - Currently, OSHA ETS states that if employees had COVID-19 and recovered within the past 3 months they are considered vaccinated (29 CFR Section 1910(l)(4)(iii)(B)(2)). Will DoD observe this same standard?
 - If an employee is having difficulty scheduling his/her vaccination due to supply shortages, will he/she be able to work provided he/she tests negative?
 - Will federal contractors be required to provide paid time off so an employee can get vaccinated? If so, how much time? At whose cost?
 - Will federal contractors be required to provide paid time off so an employee can recover from vaccination? If so, how much time? At whose cost?
 - Will medical certification be needed for a post-vaccination absence?
 - Will guidance on boosters be provided?

- **Questions related to testing for employees of existing contracts**
 - Will employees be required to undergo Nucleic Acid Amplification Tests (*e.g.*, PCR), or will antigen tests (*i.e.*, “rapid” tests) be sufficient?
 - If PCR is required, can the employee continue to work while awaiting the test results? If rapid testing is allowed, how will results be reported?
 - Will federal contractors be required to pay for the tests or can they require employees to bear some or all the cost of testing? If the cost is to be borne by contractors, is the cost chargeable under the contract?
 - How will testing requirements interact with state law payment requirements?
 - Will self-testing be permitted? If so, will there be guidelines on how an employee is to report the self-test results?
 - Will the federal government be offering assistance to contractors, counties, and/or states to increase the number of available testing sites?
 - Will the federal government be offering any financial assistance to contractors for testing in lieu of, or in addition to, vaccination?
 - Will there be procedures in the event an employee cannot get tested on time because appointments for testing are unavailable?
 - Is the time employees use for vaccination or testing compensable and, if so, is that time chargeable under the contract?
 - Will contractors be required to retain written documentation of employee testing? If so, what information and/or documentation must the contractor collect?
 - Will contractors be required to retain written documentation of employee vaccinations? If so, what information and/or documentation must the contractor collect?
- **Questions related to accommodations**
 - Will contractors be required to retain written documentation of employee accommodations? If so, what information and/or documentation must the contractor collect?
 - For medical accommodations, will a letter or note from the employee’s physician attesting to the employee’s need for a medical exemption from vaccination be required or will an attestation in lieu of a letter or note be sufficient?
 - For medical accommodations, will letters or notes from alternative health care providers (*i.e.*, acupuncturists, herbal specialists, homeopathic specialists, naturopathic specialists, nutritionists, etc.) be acceptable?
 - For religious accommodations, will a letter or note from the employee’s minister or spiritual guide attesting to the employee’s need for a religious exemption from vaccination be required or will employees be permitted to submit their own attestation in lieu of a letter or note?
 - If an employee requests a religious exemption from vaccination and from having to wear a mask but submits to regular testing, will the employee be permitted to continue working on the contract?

- Do existing standards for assessing religious accommodations (*de minimis* impact on workplace) apply?
- For employees who have a legitimate religious or disability-based reason they cannot get the COVID-19 vaccine, what accommodation if any can be made to allow employees into the workplace? *E.g.*, may the employer accommodate them by offering testing instead and, if so, how often must they test?
- What accommodations will be made for federal contractors located in states with laws prohibiting vaccine mandates?
- **Questions related to non-compliance**
 - If an employee refuses to be vaccinated, and he/she does not qualify for medical or religious exemption, will the employer be required to remove the employee from work on the contract in order to retain the contract?
 - If an employee is covered under a collective bargaining agreement and the union will not permit the employee to be removed from the worksite unless progressive discipline is applied (*i.e.*, the employee has failed to comply with testing requirements on multiple occasions), will the government's vaccine requirement supersede the collective bargaining agreement?
- **Questions related to enforcement**
 - Will the requirements for all federal agencies with which an employer has a federal contract (or covered subcontract) be standardized?
 - If there is a court order enjoining or suspending the requirement, will DoD consider it a violation if contractors wait for a final ruling before vaccinating?
 - Will the vaccine requirement become the enforcement responsibility of the DoD contracting officer, the US DOL OSHA, W&H Division, OFCCP, or some other agency?
 - What enforcement mechanisms will be used? Will monetary fines be imposed?
 - Will non-compliance by employees impact the contracting agency's assessment of the contractor's ability to perform on the contract (*i.e.*, Responsibility)?
 - Could contractors be subject to debarment if employees repeatedly violate the vaccination mandates? With or without employer efforts at enforcement?
 - Will the DoD require that contractors permit the DoD to audit their vaccination, testing, or accommodation records? If so, how will the DoD ensure that the contractor is able to comply with its confidentiality obligations under the Americans with Disabilities Act?
 - Will disputes on enforcement actions for noncompliance be appealable? If so, to which agency?
 - If an employee's lawsuit against the company as a result of this vaccine mandate is decided in favor of the employee and the company now owes settlement payments, will this be an allowable cost under the contract?
 - If the contractor is required to provide their own legal counsel in the event of a lawsuit associated with the vaccine mandate, will there be an equitable adjustment


to the contract ceiling to cover the increase cost as a result of our increased rates to cover these potential costs?

- **Questions related to geographic coverage**
 - Please specify the geographic coverage for the obligations under EO 14042.
 - Where the availability of vaccines and testing is limited, will allowances be made for contractors operating in those areas? For example, at workplace locations in the Pacific, at Tripler Hospital, or other military health care clinics located in the Indo-Pacific region?

Thank you in advance for your consideration of the comments by ELA. We are happy to provide any additional information you may need or to answer any questions you may have. As noted above, we may submit additional inquiries by October 17, 2021.

Respectfully,

Stephen Hirschfeld, Esq.



Chief Executive Officer
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